PAROL EVIDENCE SHOWS RELEASE LIMITED TO ORIGINAL TORT-FEASOR

Couillard v. Charles T. Miller Hosp., Inc.,
92 N.W.2d 96 (1958)

Plaintiff was injured in a fall on a bus. She alleged that her injuries were aggravated by the malpractice of the defendant doctors. Defendants interposed a release given to the bus company by the plaintiff. On appeal from a summary judgment for the defendant, plaintiff urged that she should be allowed to show that the release was not intended to discharge defendants nor to release her cause of action as to the injuries caused by defendants' negligence. The court in reversing held that although the release is prima facie evidence that plaintiff intended to release her entire cause of action, parol evidence should be admitted to show otherwise.

At common law, there was said to be but one indivisible cause of action against joint tort-feasors and since a release discharged that cause of action, the release of one joint tort-feasor necessarily released the other. But, at common law "joint" tort-feasors included only tort-feasors who acted in concert.[1] Many modern courts, however, have attached a looser meaning to this phrase and use it to include nearly all persons liable for the same tort damage. The expansion of the phrase "joint tort-feasors" has been accompanied by a corresponding expansion of the effect given to a release.[2]

This case is an example of that expansion. It is settled tort law that when a tort victim chooses a physician with due care, the original tort-feasor is liable for subsequent aggravation of the injury by the negligence of the physician, on the theory that the original tort is the proximate cause of the subsequent aggravation.[3] Hence, the majority of states in this country hold that the release of the original tort-feasor discharges the liability of the subsequently negligent doctor.[4]

This rule could work a hardship in certain situations. In the present case, the release in question was given after the trial of a suit against the bus company had begun. The trial judge had erroneously ruled that any malpractice injuries constituted a separate cause of action for which the bus company was not liable. The plaintiff here alleges that the settlement was reached and the release given on that basis. Despite the fact that "ignorance of the law excuses no one" it does seem likely that a settlement reached after the commencement of a trial will usually be based on the evidence and rulings of law which appear at the trial.

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[1] PROSSER, TORTS § 46 (2d ed. 1954).

[2] 76 C.J.S. *Release* § 50 (1952).

[3] Tanner v. Espey, 128 Ohio St. 82, 190 N.E. 229 (1934).

[4] Dickow v. Cookinham, 123 Cal. App. 2d 81, 266 P.2d 63 (1954).

In some cases the malpractice injuries might not have been discovered at the time the release is given to the original tort-feasor. Further, it would seem, on principle at least, that if the malpractice occurred *after* the release was given we would have the unusual situation of the plaintiff's releasing his cause of action against the doctor before it ever arose.

These considerations have caused several states to change this rule by statute.[5] Even in states which have not legislated on the subject, there is a strong minority which holds that a release of one tort-feasor does not release the second if there is an express reservation of rights against the second.[6] Some courts, as here, have looked behind the written words of the release, receiving parol evidence in an attempt to determine the intent of the parties. Other courts have held outright that the release does not discharge other tort-feasors unless the plaintiff has received full compensation for the injuries or has agreed to settle for less.[7]

When courts admit parol evidence to determine what effect the parties to the release intended it to have, the defendant generally raises the parol evidence rule; that is, that parol evidence should not be admitted to vary the terms of a written contract. Minority-rule states answer this contention in two ways, both of which are employed in the instant case. (1) The defendant, not being a party to the agreement, has no standing to raise the parol evidence rule and rely on the sanctity of the writing. This would seem to be sound contract law.[8] (2) Parol evidence may be admitted to show that the parties to the release were mutually mistaken as to some material element of fact at the time the release was given. The court in this case said that any unknown injuries constitute a mistake unless the parties expressly contract to release unknown injuries.[9]

It is a basic principle of tort law that an injured party should be compensated but once for the same injury. Generally, when courts accept parol evidence about a release, in a suit against one other than the releasee, they do so to determine whether or not the plaintiff intended to release all rights arising out of his injuries. Did he feel that he was receiving full compensation from the releasee or was he releasing his cause of action against him for less than full compensation, intending to be compensated further by others liable for his injuries? Seldom,

[5] ARK. STAT. § 34-1004 (1941); DEL. CODE ANN. tit. 10, § 6304 (1953); MICH. STAT. ANN. § 27.1683(2) (1942). *Cf.* LA. CIVIL CODE art. 2203 (1952).

[6] Adams Express Co. v. Beckwith, 100 Ohio St. 348, 126 N.E. 300 (1919).

[7] McKenna v. Austin, 77 App. D.C. 228, 134 F.2d 659 (1943).

[8] 4 CORBIN, CONTRACTS § 934 (1950).

[9] The release in the instant case might be construed to release unknown injuries. It discharged the bus company "from all claims and demands of every kind and nature for all injuries and damages and all effects and results thereof, whether past, present or future that ever may be thought of as resulting or ever developing at any time in the future from such accident and injuries." 92 N.W.2d at 98.

however, do the courts question the fact that the plaintiff intended fully to discharge the releasee.

In this case the court said the plaintiff would have a cause of action if she could prove she had not intended to release the *injuries* on which she sued the alleged subsequent tort-feasors. The court may have been prompted to decide on this basis because of the theory of the plaintiff's argument; that is, that the original settlement was made on the basis of the trial judge's ruling that the bus company was not liable for the subsequent aggravation of the injuries. Still, it seems they could have held that the plaintiff might show that she had fully released the bus company for a sum adequate to compensate her for the injuries caused directly by the fall on the bus but with an intention to reserve her rights to pursue the doctors for compensation for the later injuries.

This may have been the more desirable course, for if it is the injuries which are to be treated as severable, and the later ones not released, is not the releasee still liable for these injuries? Add to this a relaxed rule for the admission of parol evidence on the basis of mistake, and the value of the release is shaken, if not destroyed. The logical result of this would be that defendants would feel forced to litigate in order to be sure that their liability was settled.

This objection could be met in three ways.

(1) The courts could refuse to relax the parol evidence rule as to mistake, but accept parol evidence on the basis that the defendant was not a party to the release. This might reach the desired result but would leave us with the anomaly that the same release could be construed to mean one thing in a suit against the releasee and another against the subsequent tort-feasor.

(2) The court could restrict the effect of the release in discharging joint tort-feasors to those who are actually *joint* tort-feasors, that is, those who acted in concert. This was the rule at common law and there are no apparent policy reasons for its enlargement.

(3) An even more direct approach was taken in the recent case of *Breen v. Peck*.[10] There, a real estate broker sued the defendant buyer for tortious interference with contract and for conspiring with the seller to defraud the plaintiff of his commission, the latter a "joint" tort in the strict sense. The defendant pleaded the release of the seller as a defense to both counts. The court, in rejecting the defense in both instances said, *inter alia*, that the common law rule of releases is founded in metaphysics rather than justice, that the rule discourages settlement and that the defendant is not entitled to a windfall from the release intended for another. The court said further that the defendant had the burden of proving that the release was intended to discharge him.

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[10] 28 N.J. 351, 146 A.2d 665 (1958).

This seems to be a just result. There is no apparent reason why a defendant should hide behind a release intended for and paid for by another. Further, by taking this straight-forward approach, parties may work out an acceptable settlement; the releasee is confidently protected by his release and the releasor is free to pursue other tort-feasors until he has been fully compensated for his injury.

Stanley K. Laughlin, Jr.